85-1183

No. - .

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

P.B.C.,
PETITIONER,

v.

D.H.,
RESPONDENT.

Response to Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

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Questions Presented.

I. Has Massachusetts properly applied the Equal Protection analysis in its protection of the fundamental constitutional rights of a mother, her husband, and their children?

II. Did Massachusetts properly apply due process analysis in dismissing the petitioner's complaint for his failure to show any cognizable interest?

III. Has the State properly applied the requirements of due process analysis as delineated by *Board of Regents* v. *Roth*?

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No. - .

In the Supreme Court of the United States.

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P.B.C.,
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D.H.,
RESPONDENT.

Response to Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

Opinion Below.

The opinion of the Massachusetts Supreme Judicial Court, which the petitioner attempts to challenge, is reported at 396 Mass. 68 (1985) and appears in the Appendix hereto at 1a.

Statement of the Case.

The above-captioned matter was a case of first impression in Massachusetts wherein a male was seeking to bastardize the legitimate child of a married couple and thereby to establish a claim of paternity to one of the couple's children. The child, N.H., is the legitimate child of D.H. and W.H. according to Massachusetts statutes and rulings delineated for the Massachusetts Supreme Judicial Court. As the Supreme Judicial Court recognized, petitioner fails to cite one authority from any jurisdiction in the United States, granting him standing to bastardize a legitimate child. Further, the court also recognized the strong need to protect the fundamental constitutional rights of a mother, her husband, and their family.

In September 1983, P.B.C. filed a complaint in the Massachusetts Probate Court to establish a claim of paternity. The parties engaged in various discovery efforts, including petitioner's efforts to obtain the administration of HLA Blood-Grouping Tests. The petitioner received a lower court order for such blood-grouping tests, including an order to incarcerate the respondent-mother, and an order for monetary penalties against the respondent.

In December 1984, respondent filed a motion to dismiss for lack of standing, for failure to state a claim upon which relief can be granted per Mass.R.Civ.P. 12(B)(6) and for lack of subject matter jurisdiction. D.H.'s motion to dismiss surveyed the authorities in Massachusetts and throughout the United States outlining P.B.C.'s failure to present any authority establishing his right to challenge the legitimacy of the child.

The respondent's motion to dismiss was denied by a probate court justice in January 1985. Respondent appealed to the Massachusetts Appeals Court which certified the matter for interlocutory review by a full panel of said court.

Subsequently, the Massachusetts Supreme Judicial Court ordered a direct appellate review on its own initiative. After consideration of written briefs and oral arguments, the Massachusetts Supreme Judicial Court ruled that the petitioner had no standing for an adjudication whether he is the father of a child conceived while the child's mother was married to another man. The Massachusetts Court ruled that while the presumption of legitimacy may be rebutted by a child's mother, his presumed father, and the child himself/herself, a stranger to the family relationship had no standing to encroach upon the family's fundamental Constitutional rights by bringing an action to establish a claim of paternity.

Statement of Facts.

The undisputed facts, submitted by the parties and recognized by the Massachusetts Court are as follows:

While the mother was married to W.H., the mother and the petitioner had a sexual relationship for a period of time, ending in July/August 1981 (App. 11a-12a). The mother also experienced marital difficulties, filing a complaint for divorce in May 1981. The child was conceived in September of 1981, when the mother had reconciled with her husband. A judgment of divorce nisi was granted by the Massachusetts Probate Court and the decree became final, automatically, on June 9, 1982. The child was born the next day.

The child was immediately acknowledged as the offspring of D.H. and her husband, W.H. The child's birth certificate lists the respondent's husband as the father and the husband has consistently acknowledged his paternity.

During the following fifteen months, through the commencement of this action, the child lived with the mother and with

her former husband, the acknowledged father. The child never lived with the plaintiff.

The complaint was filed on September 6, 1983. Since that date, the mother, D.H., her former husband, W.H., have remarried, and have lived continuously together with their children as a family (App. 10a, 12a).

During eighteen months of probate court hearings, the petitioner never presented any evidence to support the allegations contained in his own complaint and his unverified affidavit. The respondent and her husband presented various indicia of their relationship with the child, including birth certificate, medical records, and affidavits.

Reasons for Denial of the Petition for Certiorari.

I. The petitioner fails to present any novel question of constitutional rights in his challenge to state court decisions which were based upon established analyses of United States Supreme Court decisions. The United States Supreme Court has previously denied certiorari in two similar efforts to appeal. *A* v. *X, Y and Z,* 641 P.2d 1222, *cert. den.,* 74 L.Ed.2d 518, 103 S. Ct. 388 (Wyo. 1982); *In Re Lisa R,* 13 Cal.3d 636 (1975), *cert. den.,* 421 U.S. 1014, *reh. den.,* 423 U.S. 885 (1975).

A. The Massachusetts Supreme Judicial Court properly applied due process analysis, finding that petitioner failed to demonstrate a cognizable interest pursuant to the analysis of the United States Supreme Court, or any state court. Massachusetts also properly applied due process analysis in recognizing the substantial fundamental constitutional rights of the mother, her husband, and their family.

The Massachusetts Supreme Judicial Court, in this case, expressly confirmed the existence of a rebuttable presumption of legitimacy in cases where a child was conceived during wed-

lock and where the child was acknowledged by a male. This presumption may be rebutted by a class of individuals who are male and female. Specifically, the mother, the presumed father, and the child all have standing to dispute the child's paternity. In this particular case, the child was conceived during wedlock, and the parents, though technically divorced, consistently acknowledged the child as their own since its birth and have remarried.

The petitioner, P.B.C., presented a fallacious argument to the Massachusetts Supreme Judicial Court and he presents the same argument to this United States Supreme Court. Specifically, petitioner asks the Court to *assume* that which he seeks to ultimately *prove*. He asks the Court to assume his paternity, and subsequently to grant him standing to attempt to prove his paternity to a child which is already recognized as the legitimate offspring of a married couple.

Failing to present any constitutional, statutory, or common law authority to support his argument, petitioner attempts to derive a right of standing from the holding and implications of *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and related cases. In *Stanley*, the petitioner was an unwed male who was the *undisputed* biological father of a decedent's children. A state law deprived the father of custody without any hearing on parental fitness or proof of neglect. The United States Supreme Court held that the undisputed father was deprived of due process and equal protection of the laws. 405 U.S. at 647-658.

It is most significant to note that *Stanley* v. *Illinois* was a *custody* case. *Paternity* and standing to bring an action regarding paternity were *not* at issue. Paternity was *undisputed*. *Stanley* provides no authority for any court to assume paternity and subsequently allow one to attempt to establish a claim of paternity.

Indeed, *Stanley* very carefully and explicitly enunciates the substantial fundamental Constitutional rights of a true father,

and of the family unit. As the court stated, "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . the Equal Protection Clause of the Fourteenth Amendment . . . and the Ninth Amendment . .." 405 U.S. at 651.

> [O]rdinarily an unwed father has a legally protectable interest in his children, and . . . he is entitled to establish that he is their natural father. But it does not follow, and *Stanley* v. *Illinois*, . . . does not require, that, in all circumstances, a man claiming to be the father of a child conceived while the child's mother is married to another man is constitutionally entitled to be heard on the question of paternity.
>
> As the plaintiff recognizes in his brief, "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934). The Commonwealth has legitimate and strong interests in "the strengthening and encouragement of family life for the protection and care of children," G.L. c. 119 § 1 (1984 ed.), and in affording legitimacy to children. *Powers* v. *Steele*, 394 Mass. 306, 310 (1985). Denying a plaintiff the right to establish his paternity in the circumstances of this case promotes these interests. . . . See *Vincent B.* v. *Joan R.*, 126 Cal.App.3d 619, 624-627 (1981); *Petitioner F.* v. *Respondent R.*, 430 A.2d 1075, 1078-1079 (Del. 1981); *A.* v. *X, Y and Z*, 641 P.2d 1222, 1226-1227 [cert. den., 74 L.Ed.2d 518, 103 S.Ct. 388] (Wyo. 1982).

(App. 6a-7a.)

As the petitioner concedes, this Court has recognized the constitutionally protected interests of a father in maintaining his parental relationship with his child. See *Lehr* v. *Robertson*, 463 U.S. 248 (1983); *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977); *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Petitioner fails to recognize that he is seeking to intrude upon a previously-established constitutionally protected, father-child relationship which is enjoyed by the respondent's husband and the child. Indeed, petitioner fails to justify his position with the decisions of the United States Supreme Court and virtually all state courts which protect the fundamental constitutional rights of women and men as parents, and families as a unit. *Moore* v. *East Cleveland*, 431 U.S. 494 (1977); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Taylor* v. *Richardson*, 354 F. Supp. 13 (1973 D.C. applying Cal. law); *State* v. *Fury*, 53 N.D. 333, 205 N.W. 977 (1925); *Deatherage* v. *Phipps*, 441 P.2d 1020 (Okla. 1967); *Re Kessler's Estate*, 76 S.D. 158, 74 N.W.2d 599 (1956); *Dorsey* v. *Williamstown*, 170 So.2d 773 (La. App. 1967); *Brugman* v. *Prejean*, 288 So.2d 702 (La. App. 1974); *Speight* v. *Wheeler*, 310 So.2d 716 (Miss. 1974); *Ventresco* v. *Bushey*, 159 Me. 241, 191 A.2d 104 (1963); *Anonymous* v. *Anonymous*, 43 Misc.2d 1050, 252 N.Y. S.W.2d 797 (1964); *Commonwealth ex rel. Weston* v. *Weston*, 201 Pa. Super. 554, 193 A.2d 782 (1963); *Re Adoption of Young*, 469 Pa. 141, 364 A.2d 1307 (1976); *Knaver* v. *Barnett*, 360 So.2d 399 (Fla. 1978); *Perkins* v. *Perkins*, 34 Conn. Supp. 187, 383 A.2d 634 (1977) (based on "long-standing policy favoring the legitimacy and best interests of children");

Hudson v. *Hudson*, 151 Neb. 210, 36 N.W.2d 851 (1949); *Lynn* v. *State*, 47 Ohio App. 158, 191 N.E. 100 (1934); *Tracy* v. *Baker*, 282 F.2d 431 (9th Cir. 1960); *P* v. *P*, 86 Misc.2d 844, 383 N.Y.S.2d 1014 (1976).

B. The analysis in this case and in all four states considering similar claims, correctly applied the requirements of due process analysis as explicated by *Board of Regents* v. *Roth*.

As set forth in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), the Court must look to the nature of interests presented and subsequently weigh the competing interests to determine entitlement to due process and the nature of due process.

This analysis was appropriately applied by the Massachusetts Supreme Judicial Court in this case, as it was correctly applied in each instance by state supreme courts, considering claims of previously unacknowledging males seeking standing to adjudicate paternity claims. See *P.B.C.* v. *D.H.*, 396 Mass. 68 (1985); *A* v. *X, Y and Z*, 641 P.2d 1222, *cert. den.*, 74 L.Ed.2d 518, 103 S. Ct. 388 (Wyo. 1982); *Vincent B.* v. *Joan R.*, 126 Cal.App.3d 619, 624-627 (1981); *Petitioner F* v. *Respondent R.*, 430 A.2d 1075, 1078-1079 (Del. 1981). Indeed, Massachusetts considered the nature of the interests involved, and, second, it assumed, for sake of argument, that the petitioner did have a cognizable interest. Even with that assumption, the Supreme Judicial Court recognized that the possible interest of the petitioner was strongly outweighed by the interests of the mother and her right to family privacy, the interests of the presumed father and his relationship to the child, the Commonwealth's interest in promoting the strength of family life for the protection and care of children, and the family's right to privacy (App. 8a-9a).

Petitioner's argument fails in that he is looking to go beyond the analysis of *Roth*. Whereas *Roth* directs the Court to consider the nature of the interests involved, the petitioner in this in-

stance, is asking the Court to *assume*, or *hypothesize* some relationship between the petitioner and the child. Such argument defies all appropriate due process analysis and the related social policy concerns.

II. Massachusetts has appropriately recognized a classification protecting the rights of mothers, presumed fathers, and children against attack by strangers to the family relationship.

The Massachusetts Supreme Judicial Court considered the equal protection arguments of the plaintiff and dismissed them, finding that this Commonwealth position recognizes the standing of a class which cannot be described as gender exclusive. In Massachusetts, as in most other states, the paternity of the child can be challenged by mothers, presumed fathers, and by the child himself/herself. The court determined this reality to be sufficient to defeat the petitioner's argument (App. 7a-8a).

The Massachusetts Court went further to consider the treatment of persons who may be in like circumstances. The court found that the petitioner is not in the same category and in the same circumstance as the mother and her husband, the presumed father, who, with the child in question and another child, constitute a family unit. The court stated:

> A challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth. When the same challenge is made by someone within the family, the ruptures in the marriage and the family, most often, have already taken place, and even when the family is intact, those within the family are in far better position than is an outsider fairly to decide whether the family can survive the challenge presented by litigation of the paternity issue. These con-

> siderations justify treating persons outside the family differently from persons within it.

(App. 8a.)

The classification which Massachusetts has recognized is not gender based and it clearly bears a substantial relation to the important governmental objective of protecting the constitutional rights of mothers, fathers, and family relationships. The petitioner is without a claim of gender-based discrimination.

Conclusion.

The petitioner's application for a writ of certiorari to the Supreme Judicial Court of Massachusetts must be denied. Petitioner has failed to raise any question of due process and he has failed to raise any question as to the propriety of the Massachusetts Equal Protection Analysis. Clearly, there has been no gender-based classification imposed by the court of this Commonwealth. Clearly, the four states which have considered this issue, have appropriately employed the due process analytical framework set forth by the United States Supreme Court. Petitioner's attempt to hypothesize his paternity and therefore seek standing to establish his paternity is a blatant

fallacy and must be dismissed. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix I.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

P.B.C. *vs.* D.H.
Middlesex, May 8, 1985.—October 10, 1985.
Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & O'CONNOR, JJ.

CIVIL ACTION commenced in the Middlesex Division of the Probate and Family Court Department on September 6, 1983.

A pretrial motion was heard by *Edward M. Ginsburg*, J.

Leave to file an interlocutory appeal was granted in the Appeals Court by *John M. Greaney*, C.J.

The Supreme Judicial Court ordered direct appellate review on its own initiative.

Steven I. Dean for the defendant.

Malcolm M. Donahue for the minor.

Muriel N. Carpenter for the plaintiff.

O'CONNOR, J. The plaintiff in this case contends that he has a right to an adjudication of whether he is the father of a child conceived while the child's mother, the defendant, was married to another man. We hold that in the circumstances of this case he has no such right.

The complaint, filed in the Probate and Family Court, requests that the court declare the plaintiff to be the natural father of the child and that he be granted custody of the child, or, if not custody, then visitation rights. The plaintiff moved that the court order that he, the mother, and the child submit to a

Human Leukocyte Antigen (HLA) white blood cell test. A judge denied the motion. Thereafter, there were proceedings in the Appeals Court and before a single justice of this court, as well as further proceedings in the trial court, resulting in the allowance of the plaintiff's motion and an order that the plaintiff, the mother, and the child submit to the test on a specified date.

When the mother and the child failed to submit to the test, a judge of the trial court imposed sanctions by ordering that the mother would be deemed to have made certain concessions favorable to the plaintiff's claim. The plaintiff then moved that the case be scheduled for trial, but, before a trial date was assigned, the mother moved to dismiss the complaint on the ground that the plaintiff lacked standing to litigate the question of his paternity. Taking into account the earlier proceedings relative to the blood test, an affidavit that had been filed by the plaintiff, and certain "undisputed evidence," a judge concluded that allowance of the motion to dismiss at that time was inappropriate, and he denied the motion. At the same time, he ordered the mother and the child to submit to the HLA test. The order provided that the possible consequences of noncompliance would be preclusion of the mother from offering evidence at trial on the issue of paternity, incarceration until she complied with the order, and assessment of "daily costs" against her.

The next procedural step was that the mother filed in the Appeals Court a petition for review of the denial of her motion to dismiss the complaint. A single justice of that court reasoned that if the test were administered and showed that the plaintiff was the child's natural father, and if then, on appeal, it was decided that the plaintiff had no standing to assert his paternity, serious and longlasting emotional damage might unnecessarily be caused to the child. Accordingly the single justice authorized an interlocutory appeal to the Appeals Court from the denial

of the mother's motion to dismiss the complaint, and he ordered a stay of further proceedings in the trial court. We transferred the case to this court on our own initiative. We remand the case to the Probate and Family Court for the entry of an order dismissing the complaint.

The trial judge and the single justice of the Appeals Court relied on matters outside the pleadings in making their rulings. The parties, too, in their briefs on appeal, rely on facts not pleaded. Therefore, we treat the motion to dismiss as a motion for summary judgment, and we consider the facts to be those expressly or impliedly set forth in the pleadings, affidavits, and briefs of the parties, and about which there appears to be no controversy.

Those facts are as follows. For an extended period of time before September, 1981, while the mother was married to another man, the mother and the plaintiff had a sexual relationship.[1] The mother filed a complaint for divorce in May, 1981. The child was conceived the following September. A judgment of divorce nisi was entered on December 8, 1981. The divorce became final on June 9, 1982, and the child was born the next day. The child has lived with the mother since birth and has never lived with the plaintiff. Since September, 1983, the mother has not allowed the plaintiff access to the child. The complaint in this case was filed on September 6, 1983, and after that the mother and her former husband remarried.

By affidavit and in her brief the mother asserts other facts which the plaintiff appears to concede. Those facts are that her remarriage to her former husband occurred on September 12, 1983, the child's birth certificate lists her husband as the

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[1] The parties dispute whether their sexual relationship continued into September, October, and November, 1981. They also dispute the extent to which the mother and her husband lived together between late 1981 and the summer of 1983. We make no assumptions as to those facts or other facts in controversy. Resolution of the controverted facts would not affect our decision.

father, the husband has never denied his paternity, and since September, 1983, the mother, her husband, the child in question, and an older child of the mother and her husband have lived together continuously. We make those assumptions.

This court has held that a child *born* to a married woman is presumed to be the child of the mother's husband. *Commonwealth* v. *Leary*, 345 Mass. 59, 60 (1962). That presumption of legitimacy may not be rebutted, even in a civil case, "except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father." *Phillips* v. *Allen*, 2 Allen 453, 454 (1861). We hold today that a child *conceived* by a married woman is presumed to be the child of the man to whom the mother was then married even if the mother and the husband are divorced at the time of the child's birth. Our holding fosters the important social policy of affording legitimacy to children whenever possible. See *Powers* v. *Steele*, 394 Mass. 306, 310 (1985); *Green* v. *Kelley*, 228 Mass. 602, 605 (1917). The plaintiff has not urged us to hold otherwise. He simply argues that he should be permitted to rebut that presumption.

Here, the mother was married at the time the child was conceived. The child, therefore, is presumed to be the husband's child. Although we have held that the presumption of legitimacy may be rebutted, and we have defined the burden of proof in that regard, we have never confronted the question whether the presumption may be rebutted by a man claiming to be the child's natural father. Nor does any statute answer the question.

The question was not before us in *Normand* v. *Barkei*, 385 Mass. 851, 853 (1982), on which the plaintiff relies as support for his contention that he has a right to prove that he is the child's father. *Normand* v. *Barkei*, *supra*, sheds little light on the issue before us because in that case the children's mother was unmarried when the children were conceived and were

born. There was no question of legitimacy. The plaintiff simply sought an order granting him visitation rights with respect to two children unquestionably illegitimate, that he claimed were his children.

We must decide for the first time, then, whether, in the circumstances of this case, a man is constitutionally entitled to a judicial determination of whether he is the natural father of a child conceived while the mother was married to another man. We conclude that he does not have that constitutional right. We further conclude, as a matter of public policy, that in the circumstances of this case we should not recognize in the plaintiff a common law right to a paternity adjudication.

The plaintiff contends that denying him the opportunity to establish his paternity would deprive him of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. He relies on *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In that case, the Supreme Court stated, "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id* at 651. An understanding of the meaning and limits of that statement is aided by an appreciation of the context in which the statement was made. *Stanley* involved an *acknowledged* father's efforts to prevent his children from being declared wards of the State upon the death of their mother with whom Stanley had intermittently lived for eighteen years. At the time of the conception and birth of the children, the mother was unmarried, as was Stanley. Unlike this case, no presumption of legitimacy was involved. An Illinois statute, conclusively presuming that a father of an illegitimate child is an unfit parent, provided that upon the mother's death the child would automatically become a ward of the State. Focusing on the "cognizable and substantial" interest of a man in the children "he has sired and raised," the Supreme Court held that the conclusive presumption deny-

ing Stanley a right to be heard on his fitness as a parent violated Stanley's right to due process. *Id.* at 649-652.

We continue to recognize, as we did in *Normand* v. *Barkei, supra,* that ordinarily an unwed father has a legally protectable interest in his children, and that he is entitled to establish that he is their natural father. But it does not follow, and *Stanley* v. *Illinois, supra,* does not require, that, in all circumstances, a man claiming to be the father of a child conceived while the child's mother is married to another man is constitutionally entitled to be heard on the question of paternity.

As the plaintiff recognizes in his brief, "the guaranty of due process. . .demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U.S. 502, 525 (1934). The Commonwealth has legitimate and strong interests in "the strengthening and encouragement of family life for the protection and care of children." G.L. c. 119, § 1 (1984 ed.), and in affording legitimacy to children. *Powers* v. *Steele,* 394 Mass. 306, 310 (1985). Denying a plaintiff the right to establish his paternity in the circumstances of this case promotes those interests. Not only was the child's mother married to a man other than the plaintiff when the child was conceived, but also the husband (the presumed father) has never denied that he is the child's natural father. Furthermore, the child's mother and the presumed father have been remarried almost since the filing of the complaint herein, and, since that time, they have continued to maintain a family unit which includes the child. Although appropriate social policy might be clearer if the marriage had been uninterrupted since the child was conceived, we are satisfied that, in the circumstances obtaining here, denying the plaintiff a right to litigate his paternity bears a substantial relationship to the aforementioned interests of the Commonwealth, and, therefore, does not violate the plaintiff's

right to due process. Here, unlike in *Stanley* v. *Illinois, supra,* there is a "powerful countervailing interest" that justifies withholding the relief the plaintiff seeks. Our holding finds support in other jurisdictions. See *Vincent B.* v. *Joan R.,* 126 Cal. App.3d 619, 624-627 (1981); *Petitioner F.* v. *Respondent R.,* 430 A.2d 1075, 1078-1079 (Del. 1981); *A.* v. *X, Y, and Z,* 641 P.2d 1222, 1226-1227 (Wyo. 1982).

The plaintiff's constitutional argument is not limited to the due process clause of the Fourteenth Amendment. He relies also on the Fourteenth Amendment's equal protection clause and on art. 106 of the Amendments to the Constitution of the Commonwealth (the Equal Rights Amendment). The plaintiff's sole argument regarding these constitutional provisions is that to deny him the right to seek an adjudication of his paternity while allowing the child's mother to do so[2] is to establish classifications based on sex, and that such classification is not constitutionally justified by its relationship to any sufficiently important interest of the Commonwealth. It is true that "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." *Caban* v. *Mohammed,* 441 U.S. 380, 388 (1979), quoting *Craig* v. *Boren,* 429 U.S. 190, 197 (1976). It is also true that "classification based on sex is subject to strict judicial scrutiny under the State [Equal Rights Amendment] and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose." *Lowell* v. *Kowalski,* 380 Mass. 663, 666 (1980). But those constitutional principles do not apply in this case because the

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[2] "The mother herself is the proper party to seek a complaint for adjudication of paternity, for expenses of the pregnancy and support of the child." *Baby X* v. *Misiano,* 373 Mass. 265, 265 (1977).

described classifications are not gender-based. Not only mothers, but presumed fathers as well, may initiate proceedings raising the issue of the child's paternity. *Symonds* v. *Symonds*, 385 Mass. 540, 544 (1982).

That the distinction between those who may initiate paternity proceedings and those who may not do so is not based on sex is enough to defeat the plaintiff's argument. Further discussion, however, is appropriate. Even though no gender-based classification has been established, "[e]qual protection of the laws requires. . . .that all persons in the same category and in the same circumstances be treated alike." *Opinion of the Justices*, 332 Mass. 769, 779-780 (1955). That requirement is met here. The plaintiff is not "in the same category and in the same circumstances" as the mother and her husband, the presumed father, who, with the child in question and another child, constitute a family unit. A challenge to the presumption that the husband is the child's father, brought by a stranger to the marriage, such as the plaintiff, has the likely effect of seriously disrupting an intact marriage and family contrary to the interests of the Commonwealth. When the same challenge is made by someone within the family, the ruptures in the marriage and family, most often, have already taken place, and even when the family is intact, those within the family are in far better position than is an outsider fairly to decide whether the family can survive the challenge presented by litigation of the paternity issue. These considerations justify treating persons outside the family differently from persons within it. *Vincent B.* v. *Joan R.*, *supra* at 627; *Petitioner F.* v. *Respondent R.*, *supra* at 1080; *A.* v. *X, Y, and Z, supra* at 1224-1226. But see *R. McG.* v. *J.W.*, 200 Colo. 345, 349-354 (1980).

We conclude that in the circumstances presented by this case a man does not have a constitutional right to an adjudication of whether he is the father of a child conceived while the child's mother was married to another man. Also, because of

the social policy we have discussed above in favor of affording legitimacy to children, whenever possible, and of "strengthening and encourag[ing] family life for the protection and care of children," we conclude that we should not recognize in the plaintiff a common law right to such an adjudication. We express no opinion as to whether the child could, at some point, for the purpose of establishing inheritance rights or for any other purpose, bring an action attempting to prove that the plaintiff is his natural father. We remand the case to the Probate and Family Court with instructions to enter an order dismissing the plaintiff's complaint.

So ordered.

Appendix II.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. PROBATE COURT
DOCKET NO. 5170

D.H.,
Petitioner

VS. AFFIDAVIT OF THE PETITIONER D.H.

P.B.C.,
Respondent

I, D.H., hereby affirm that the following facts are true to the best of my knowledge and belief:

1. In September, 1972, I met W H at College in , Massachusetts, where we were both students.
2. In May, 1974, W H graduated from College and I shortly thereafter, in September, 1974, began nursing school at the School of Nursing.
3. W H and I were married in March, 1975 and we moved into an apartment at Street in , Massachusetts.
4. On November 17, 1977, W H and I had our first child, .
5. In July, 1978, W H began a full-time graduate program at University. I began working full-time as a nurse to help support our family.
8. In January, 1979, I began working at a new job as a nurse at the Hospital in , Massachusetts.
7. In July, 1979, I was transferred to the emergency department of the Hospital.

8. In August, 1979, I was introduced to P B C who was a supervising physician in the emergency room at the Hospital.

9. Late in 1979 and early in 1980, P B C and I became friends. He made repeated efforts to develop a romantic relationship; however, I refused his repeated offers. We did become friends, and during that period he began to tell me many details about his divorce. In March, 1980, while W H and I were having disagreements, P B C encouraged me to see , a social worker who had counselled with P B C during his divorce. P B C told me that he thought could help me to work through my disagreements with my husband W H, whether that meant separation or reconciliation. Also, in March, 1980, P B C strongly encouraged me to see Attorney who had counselled P B C through his divorce. P B C stated at that time that if I did not take some sort of legal action, and my disagreements with W H continued, that W H might remove our child from the area. I did see P B C's attorney, , and was informed that I did not need to take any legal action.

10. In May, 1980, after five years of marriage, W H and I separated. W H continued his studies at University and began working full time at the School, while I continued in my capacity as a nurse at the Hospital. W H and I continued to maintain contact and to mutually care for our daughter, .

11. In July, 1980, while W H and I were separated, I entered into a physical relationship with P B C. He had made many attempts to start one earlier, but I had refused. During this time, he enlisted my help with his children from a previous marriage who were in the custody of his ex-wife, . During this time, I did help with his children by visiting them, and became friends with his children. At the same time I was continuing with my husband, W H, to mutually care for our daughter, .

12. In February, 1981, my husband, W H, discontinued his studies at University to take on a second job. He began giving me additional money to help support our daughter, . W H and I continued to meet very regularly to do things as a family with our daughter, .

13. In May, 1981, W H and I had an argument about his being late picking up for an overnight stay. P B C, at that point, urged me to leave at P B C's house while I met W H, "to teach him a lesson." P B C had been encouraging me for over a year to obtain a divorce from my husband, W H, and on this night in May, 1981, P B C again urged me to see his attorney, , once again to obtain a restraining order against W H and to take action toward a divorce. The next morning I met with attorney , an associate of attorney . Attorney stated that in addition to obtaining a restraining order it would be advantageous to file for a divorce. That afternoon, attorney and I appeared in Cambridge to obtain a restraining order and to file for a divorce, upon P B C's urging.

14. In August, 1981, my husband W H and I began a process of reconciliation. In that same month of August, I terminated my relationship with P B C, never having relations with him again. Late one weekend in August, my daughter, and I spent a weekend camping in Salisbury with my husband, W H, and W H and I resumed all aspects of our marriage relationship.

15. In September, 1981, W H and I began staying together on a regular basis, and continued to have relations which we had resumed in August, 1981. On September 5, 1981, he took me out for my birthday and we spent that night together. It was on that night that we believe our son, , was conceived.

16. In November, 1981, I told my husband W H that I was pregnant, and we decided that we should live together and, after making arrangements, W H moved in with me in December, 1981.

17. During this period, W H and I discussed whether to let the divorce proceedings continue or whether to terminate the divorce proceedings. We decided to let the divorce go through because we thought it would be much easier to simply let the proceedings continue and get remarried, rather than to stop the proceedings through our attorneys. It had been a very stressful period of time since I had filed for a divorce at P B C's urging, and W H and I did not wish to have any more involvement with the legal proceedings or with P B C.

18. In January, 1982, P B C called me, begged me to meet him, and asked me to meet him at a Howard Johnson's restaurant to talk. I met with him at the restaurant and told him that W H and I were living together again, that our relationship was well, and that I was happy, and that I did not want to see P B C again. During this period of time, I was continuing to have contact with P B C's daughter, , whom I had befriended in the previous year. However, I never, during my conversations with , asked to meet P B C, and never asked if I could meet her at P B C's house.

19. On June 9, 1982, the divorce decree between W H and I became absolute. At the time, W H and I were living together as husband and wife, holding ourselves out as a family unit with our daughter, . At the time, we were not aware that the divorce decree had become absolute.

20. On June 10, 1982, our child, N H, was born. His birth certificate lists my husband, W H and myself, as the parents. At the time of N H's birth, W H acknowledged N H as his child, we acknowledged ourselves as the parents of N H, and continued to live together as a family.

21. In August, 1982, P B C's daughter, , invited me for a visit. While I was there, P B C came home and stated that he was forty-one years old, and he wanted to die. When I asked him why, he refused to discuss it. He also asked if N H was his child, and I told him no. He stated that he didn't think

he was. P B C stated he loved me, missed me, and began pressuring me to see him again. I did not want that, as W H and I were living together again, and had resumed our family relationship. P B C continued to pressure me, however, and I became confused. At the time, I was experiencing post-partum depression and, as a result of the additional pressure applied by P B C, I began to see the only social worker with whom I had any prior experience, , whom I had met two years previous through P B C. After several sessions with , I refused to attend any further sessions because I felt both and P B C were encouraging me to resume my relationship with P B C. I did not want to continue that relationship, I loved W H. did not appear sensitive to my feelings, and seemed to be aligning herself with P B C; therefore, I discontinued counselling sessions.

During this time, in August, 1982, P B C became concerned about any possibility that he was N H's biological father. He did not want anyone to know about our previous relationship, and did not want anything to do with N H. He made me promise that I would never sue him for paternity. He never once mentioned having blood tests done. I never asked him for child support. There were no planned visits between N H and P B C. P B C did see N H on occasion when I was visiting P B C's children with whom I did have a good relationship; however, such occasions were rare, and I never intended nor wanted N H to have any exposure to P B C for various reasons.

22. P B C's efforts to draw me away from my husband, W H, and to interfere with our family relationship continued throught [*sic*] the spring of 1983. During that period, W H and I decided that we would move out of as we were looking for additional living space as a family, and we wished to find what we thought would be a better school system for our daughter, , who was about to enter first grade in September. I wanted to live in because of the quality

of the school system, and also because W H and I attended church at in . W H felt that was too far away for his business. W H and I were unable to come to any agreement regarding a town, and, I therefore, had decided that I would attempt to rent an apartment in hoping that W H would find it to be a desirable area and a convenient are, [*sic*] and therefore, change his mind about buying a house there.

23. During this period of time, in the spring of 1983, P B C upon hearing that I was looking for a place to live, offered to take me to a realtor in who was a friend of his, and who had sold him a house in the past. That realtor, Realty, suggested that P B C buy a house as an investment, and rent me the house or a portion of it. P B C purchased a house in , with plans of converting it into an illegal two-family house, and agreed to rent me that house for $650.00 per month.

24. In June, 1983, I moved into the house in . W H helped me to move into the house. While W H and I disagreed as to where we ought to be living, we continued to work on provided [*sic*] a family home environment for the children. W H, at that time, continued to provide financial support for both our children, and W H also stayed at the house very frequently.

During the initial month I was living in , P B C attempted to intrude upon my family relationships, and attempted to exercise some control over me as my landlord. P B C would drive by the apartment late at night, complain to me later about W H and I continuing to live together, and attempt through various means to have access to my children, and N H. W H and I avoided these efforts by P B C, wanting to protect our children, and N H, from contact with P B C. We did have a close relationship with P B C's daughter , and she continued to baby-sit for and N H. Infrequently, would request to baby-sit at her own house for her convenience,

so I brought a crib and a portable high chair, which W H and I had purchased for N H, over to 's house for her to use in caring for N H along with toys for both children. This continued until moved back with her mother.

25. After living in for approximately one month, I realized that I had made a mistake, and that W H was not going to change his mind about locating permanently in . W H and I began to discuss the possibility of buying a house in another town, specifically, , and in late July began looking for a house in that town. At that point, P B C became concerned about my intention to move away from , and P B C asked me to refrain from paying him the agreed upon $650.00 per month rent, stating that he would deduct it from the $2,000.00 I had loaned him to purchase the house. P B C also became much more persistent in his efforts to interfere with the family relationship that W H and I were enjoying.

26. In August, 1983, W H and I went on a vacation together. We had made our decision to relocate, and we had also decided to remarry in the fall.

27. Two weeks later, P B C filed a lawsuit against me and served me with restraining orders. I immediately moved back to with W H and our children, intending to remain there until W H and I were able to purchase a house in .

28. On September 12, 1983, W H and I remarried.

29. On November 10, 1983, we purchased a two family house in .

30. W H and I have had a very good, solid, loving and caring relationship both during our previous marriage and since our reconciliation in August, 1981. Our relationship and our family relationship has especially flourished since our remarriage in September, 1983 and our move to . Our marriage has never been stronger. We would like to have

another child, but feel we should wait until the Court proceedings in this case have been resolved.

This Court case has taken a great toll on us, emotionally and financially. I believe that P B C has taken this action out of revenge and malice as demonstrated by his actions and as demonstrated by the fact that he never acknowledged N H as his child or attempted to assert any claim to paternity for over fifteen (15) months following N H's birth. He only began to assert any claims to paternity after he realized that W H and I were going to remarry in September, 1983.

Signed under the Pains and Penalties of Perjury, this 13th day of July, 1984.

/s/_____

D.H.